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State v. Baeza Appellant's Brief Dckt. 42988

IN THE SUPREME COURT OF THE STATE OF IDAHO

STATE OF IDAHO, Plaintiff-Respondent, v. MARCELINO B. BAEZA, Defendant-Appellant.	NO. 42988 BLAINE COUNTY NO. CR 2013-2111 APPELLANT'S BRIEF

BRIEF OF APPELLANT

APPEAL FROM THE DISTRICT COURT OF THE FIFTH JUDICIAL DISTRICT OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF BLAINE

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STATEMENT OF THE CASE

Nature of the Case

Following a jury trial, forty-six-year-old Marcelino B. Baeza was convicted of one count of felony lewd conduct with a minor child under sixteen, and acquitted on one count of lewd conduct. The district court imposed a unified sentence of twenty years, with ten years fixed.

With the district court's approval, the complaining child witness was allowed to testify at the trial, outside Mr. Baeza's physical presence, by closed circuit television. On appeal, Mr. Baeza asserts the district court's order approving that alternative method violated his due process right to a fair trial because the alternative method infringed on his presumption of innocence.

Statement of the Facts and Course of Proceedings

J.C., a five-year-old girl at the time, reportedly told her parents that her uncle, Mr. Baeza, had put his finger in her vagina and anus while they were at Mr. Baeza's residence. (*See* Presentence Report, p.3.)

The State filed a Criminal Complaint alleging Mr. Baeza had committed one count of lewd conduct with a minor child under sixteen, felony, in violation of I.C. §18-1508. (R., pp.17-19.) The State later had the complaint dismissed, and a grand jury charged Mr. Baeza by Indictment with two counts of felony lewd conduct. (R., pp.41-49.) Count One accused Mr. Baeza of manual to genital contact with J.C., and Count Two accused him of manual to anal contact with her. (R., pp.48-49.)

The State later filed a Motion for Hearing to Allow Child Witness Testimony by Alternative Method, on the basis that "the State's key witness is a five year old child that will suffer serious emotional trauma that would substantially impair the child's ability to

communicate with the finder of fact if the child is required to testify in an open forum or required to be confronted face-to-face by the Defendant." (R., pp.149-50.)

At the hearing on the motion to allow testimony by alternative method, Tami Kammer, a licensed clinical professional counselor, testified she had been treating J.C. in that capacity for "sexual trauma." (Tr., Jan. 16, 2014, p.8, L.10 – p.10, L.12, p.13, L.12 – p.14, L.7.) According to Ms. Kammer, J.C. was suffering from post-traumatic stress disorder. (Tr., Jan. 16, 2014, p.14, Ls.20-22.) Ms. Kammer testified that J.C. would be deeply traumatized by having to testify in an open courtroom or in front of Mr. Baeza. (Tr., Jan. 16, 2014, p.14, L.23 – p.16, L.8.) Ms. Kammer also stated requiring J.C. to testify in an open forum or in front of Mr. Baeza would impair her ability to communicate. (Tr., Jan.16, 2014, p.16, Ls.9-13.) She testified that J.C. was fearful of Mr. Baeza. (Tr., Jan. 16, 2014, p.16, Ls.14-17.)

On cross-examination, Ms. Kammer testified she did not know, based on J.C. testifying before the grand jury, whether J.C. would be able to do it again at trial. (Tr., Jan. 16, 2014, p.19, L.7 – p.20, L.8.) She testified that J.C.'s parents told her J.C. shut down after the testimony. (Tr., Jan. 16, 2014, p.20, Ls.8-10.) On redirect examination, Ms. Kammer testified she was aware that the grand jury proceedings basically had to be suspended and J.C. had to be recalled as a witness, and that the disassociation, reoccurring nightmares, and other trauma J.C. suffered following her grand jury testimony was the kind of trauma Ms. Kammer had been discussing in terms of trial. (Tr., Jan. 16, 2014, p.22, L.10 – p.23, L.3.)

The State, based on Ms. Kammer's testimony, I.C. §§ 9-1805 and 9-1806, and *Maryland v. Craig*, 497 U.S. 836 (1990), argued the district court should allow J.C. to testify by alternative method. (Tr., Jan. 16, 2014, p.24, L.13 – p.36, L.25.) The State

contended it had met its burden of showing clear and convincing evidence that J.C. would be traumatized if required to testify in an open forum or in front of Mr. Baeza. (Tr., Jan. 16, 2014, p.34, L.22 – p.35, L.4.)

After getting leave from the district court to submit a written response (Tr., Jan. 16, 2014, p.38, L.20 – p.39, L.9), Mr. Baeza filed a Defendant's Written Argument Re: Child's Testimony. (R., pp.171-75.) He asserted Idaho statutes could not violate the United States or Idaho Constitutions. (*See* R., p.171.) In his "Confrontation Clause" challenge to the alternative method, Mr. Baeza asserted J.C. had been able to testify before the grand jury, and that Ms. Kammer did not know whether J.C. would be able to testify again or not. (R., p.172.) In his "Due Process Clause and the Presumption of Innocence" challenge, Mr. Baeza asserted that having J.C. testify remotely would turn the due process guarantees of a fair trial and the presumption of innocence "into mere nullities." (R., p.172.) Mr. Baeza asserted that "[a]s soon as the jury in this case hears or sees that [J.C.] will be testifying in something other than the normal way witnesses testify, there [will] be the automatic assumption that the Court must be doing it this way because the Court needs to keep the child away from this predator who has obviously committed some heinous act." (R., p.173.)

The district court then issued a Pretrial Order Regarding Alternative Method of Victim's Testimony. (R., pp.193-99.) The district court concluded "by clear and convincing evidence that the child would suffer serious emotional trauma that would substantially impair the child's ability to communicate with the finder of fact if required to be confronted face-to-face by the defendant. An alternative form of testimony will be allowed." (R., pp.195-96.) However, the district court was "unable to conclude by clear and convincing evidence that the child would suffer serious emotional trauma that would

substantially impair the child's ability to communicate with the finder of fact if the child was required to testify in an open forum, particularly if some methods are utilized to relieve some of her anxiety." (R., p.196.)

The district court further stated it had "thoroughly considered all of the factors listed in I.C. § 9-1806." (R., p.196.) The district court determined Mr. Baeza "will not be present in court during the victim's testimony. He will be maintained close by, in a separate room, with a closed circuit television enabling him to see and hear the questions from counsel, the Court, and the victim's testimony as it occurs." (R., p.197.) The district court contemplated Mr. Baeza would possibly need to have his own interpreter present in the room with him, and that he would need a device or method available to enable him to contact his attorney immediately and directly. (R., pp.197-98.) However, the district court did not address Mr. Baeza's argument on the due process right to a fair trial and the presumption of innocence. (*See* R., pp.193-98.)

After conducting a competency hearing, the district court found J.C. qualified as a witness. (*See* R., p.215.) The State subsequently filed a Motion to Close Trial and to Allow Child Friendly Procedures During Victim's Testimony. (R., pp.225-28.) The State argued for closing the courtroom during J.C.'s testimony because "[t]here is a substantial likelihood that the victim's ability to communicate will be significantly impaired if she is required to testify in an open courtroom full of people," and the State had a compelling interest in protecting minor victims of sex crimes from further trauma and embarrassment sufficient to outweigh the right to an open and public trial. (R., pp.225-26.) The State also requested several "child friendly procedures." (R., p.226.) At a hearing on the motion to close trial, Mr. Baeza objected to closing the trial to the public and to some of the requested child friendly procedures. (Tr., Apr. 15,

2014, p.42, L.16 – p.45, L.14.) In the Second Pretrial Order Regarding Alternative Method of Victim's Testimony, the district court determined "the public and the defendant should be excluded during the child victim's testimony," subject to certain conditions. (R., pp.239-42.)

The presiding district judge then recused himself from the case, and the administrative judge assigned a new district judge. (R., pp.281-82.) Mr. Baeza later filed a Defendant's Motion to Reconsider the State's original motion to allow testimony by alternative method. (R., pp.327-28.)

At the hearing on the motion to reconsider, Mr. Baeza told the new presiding district judge through counsel, "I want the court to be particularly worried about the fairness of this whole process in terms of due process jurisprudence to Mr. Baeza, versus the protection of the complaining witness in this case, from undue hardship we'll call it." (Tr., July 1, 2014, p.10, Ls.8-12.) He further stated that if due process considerations had to be balanced against not causing J.C. undue harm or trauma, preserving Mr. Baeza's right to a fair trial would have to prevail. (Tr., July 1, 2014, p.10, L.19 – p.11, L.2.) Mr. Baeza explained that under the approved special procedures he would have to leave the courtroom when J.C. testified, his family members would also have to leave the courtroom, and an advocate would be able to sit with J.C. on the witness stand. (Tr., July 1, 2014, p.11, L.2 – p.14, L.1.) Mr. Baeza asked, "what effect will this procedure have on the jury?" (Tr., July 1, 2014, p.15, Ls.14-15.) He continued:

> Here's what I think is going to happen. They're going to think this—a judge has decided—this judge has decided that this little girl can't even be in the same room with him, in the same large courtroom with him, with guards arounds and everybody else, all these adults, can't even be in the same room with that guy, and she can't even be in the same room with the guy's family because that's the kind of trauma that it would cause her to be in here with the guy, then certainly this guy must have done something,

> and absolutely it must have been something bad and if that's the kind of trauma it caused I don't need to hear anything more.

(Tr., July 1, 2014, p.15, L.16 – p.16, L.3.) He asserted the combination of special procedures would be "infringing into the due process rights that [Mr. Baeza] has to a fair trial." (Tr., July 1, 2014, p.16, Ls.12-14.)

The State argued the interests of Mr. Baeza and J.C. could both be protected under the district court's previous rulings. (Tr., July 1, 2014, p.19, Ls.8-14.) The State argued the special procedures were required giving the nature of the case and J.C.'s age. (Tr., July 1, 2014, p.19, Ls.14-18.) The State proposed giving a jury instruction where the jury would be instructed not to give any different weight to J.C's testimony simply because of the procedures used during her testimony. (Tr., July 1, 2014, p.22, Ls.17-22.) The State also argued closure of the trial during J.C.'s testimony was necessitated by a compelling interest. (Tr., July 1, 2014, p.35, L.24 – p.36, L.8.)

The district court suggested "the alternative of the alleged victim being in a separate room and being questioned by both counsel over closed circuit TV so everything everybody sees or hears is the same: The jurors hear the same thing, the defendant hears the same thing, the attorneys hear the same thing." (Tr., July 1, 2014, p.37, Ls.13-18.) The district court stated there would be less of a need to exclude the public, because everybody could see what was going on without the witness being in an open forum. (Tr., July 1, 2014, p.37, Ls.19-23.)

The State indicated it would not have any objection with that alternative. (Tr., July 1, 2014, p.37, L.24 – p.38, L.13.) Mr. Baeza stated through counsel, "I'm not for anything that's anything different than what we are required to do under the constitution." (Tr., July 1, 2014, p.40, Ls.4-6.) He indicated Mr. Baeza's preference in

the reconsideration was to have live testimony without any special accommodations. (Tr., July 1, 2014, p.40, Ls.8-15.)

Mr. Baeza asserted the alternative methods and public trial issues were not really separate, and that "[t]he Idaho Constitution, Article I, Section 13, that is titled Guarantee in a Criminal Action and Due Process of Law." (Tr., July 1, 2014, p.40, Ls.17-24.) According to defense counsel, "when you balance the constitutional guarantees [Mr. Baeza] has to a fair trial on the one hand in a case this serious, versus some sleep issues and some anxiety issues on the other hand for this girl, I think it's clear [where] the balance lies. So I would want this to go like a normal trial." (Tr., July 1, 2014, p.42, Ls.11-17.) Mr. Baeza also clarified the objections were rooted in both the United States and Idaho Constitutions. (Tr., July 1, 2014, p.46, Ls.12-21.)

The district court later issued an Order Re: Testimony by Alternate Method. (R., pp.409-17.) The district court found, "based on the testimony of [Ms.] Kammer, there is clear and convincing evidence that the child would suffer serious emotional trauma that would substantially impair her ability to communicate with the jury if she is required to be confronted face-to-face by the Defendant." (R., p.413.) The district court therefore allowed testimony by alternative means, after considering the factors in I.C. § 9-1806. (R., p.413.) However, the district court stated it "must respectfully disagree with the method previously ordered and must order an alternative method that is no more restrictive of the rights of the parties than is necessary." (R., p.414.)

The district court ordered that J.C., "if called as a witness, will be allowed to testify via closed-circuit television" from a room in the courthouse. (R., p.415.) J.C. would have to be visible to the district court, Mr. Baeza, counsel, the jury, and others physically present in the courtroom. (R., p.415.) The attorneys conducting the

questioning and J.C. would have to be able to see and hear each other simultaneously and communicate with each other during the testimony, but the camera would be place so Mr. Baeza would not be seen by J.C. (R., p.415.) Mr. Baeza would be able to consult privately with counsel. (R., p.416.) The district court allowed an interpreter, videographer, and victim witness coordinator in the room while J.C. was testifying. (R., p.416.) Support personnel would be visible on camera, and a bailiff would report any off-camera contact with J.C. (R., p.416.) Other child-friendly procedures could also be used. (R., p.416.)

The case proceeded to a jury trial. (R., pp.446-50, 463-69.) Before J.C. gave her testimony, the district court instructed the jury: "Do not give any different weight to [J.C.'s] testimony because of the child-friendly procedures used during her testimony." (Tr., Aug. 12, 2014, p.333, L.25 – p.334, L.4.) J.C. testified she was in Mr. Baeza's living room when Mr. Baeza made manual to genital and manual to anal contact with her. (Tr., Aug. 12, 2014, p.343, L.6 – p.346, L.15.) J.C.'s parents testified there was blood in the toilet after J.C. used the bathroom upon returning home from Mr. Baeza's house, and J.C.'s underwear and vagina were bloody. (Tr., Aug. 12, 2014, p.369, L.23 – p.372, L.21, p.405, L.22 – p.407, L.21.) J.C.'s mother testified they when she asked J.C. if someone had touched her, J.C. stated Mr. Baeza touched her vagina and behind. (Tr., Aug. 12, 2014, p.372, L.22 – p.374, L.1.)

Angela Brady, a nurse at St. Luke's Wood River who examined J.C. the day of the incident, testified J.C. had an abrasion in her vaginal area. (Tr., Aug. 13, 2014, p.519, Ls.9-22.) Doctor Debra Robertson also examined J.C. and testified J.C. had a small abrasion in her left labia minora. (Tr., Aug. 13, 2014, p.541, L.16 – p.543, L.7.) The abrasion was about three millimeters. (Tr., Aug. 13, 2014, p.562, L.20 – p.563,

L.3.) Nurse Brady additionally testified J.C. reported that Mr. Baeza caused the injuries of which J.C. was complaining. (Tr., Aug. 13, 2014, p.529, Ls.19-25.)

On cross-examination, Nurse Brady testified her report stated no obvious injury to J.C.'s anus. (Tr., Aug. 13, 2014, p.532, Ls.3-14.) Dr. Robertson testified she did not notice any abnormalities about J.C.'s rectal area. (Tr., Aug. 13, 2014, p.551, Ls.3-7.) Lori Burks, an employee of the Blaine County Prosecutor's Office, testified that in an interview between J.C. and the prosecutor in preparation for trial, J.C. stated Mr. Baeza never touched her in the anus. (Tr., Aug. 13, 2014, p.631, L.16 – p.632, L.7.)

Mr. Baeza's daughter testified there was never a time when Mr. Baeza could have been alone with J.C. on the day of the incident. (Tr., Aug. 13, 2014, p.593, Ls.22-24.) She testified that J.C. ate ice cream and then played in the garage on a tricycle. (Tr., Aug. 13, 2014, p.588, L.14 – p.592, L.9.) But on cross-examination, Mr. Baeza's daughter testified there were times she was not with both Mr. Baeza and J.C. (Tr., Aug. 13, 2014, p.606, L.3 – p.606, L.4.)

After the parties rested, the district court again instructed the jury: "Do not give any different weight to [J.C.'s] testimony because of the child-friendly procedures used during her testimony." (Tr., Aug. 14, 2014, p.672, Ls.18-22.) The jury found Mr. Baeza guilty of the manual to genital count of lewd conduct, and not guilty of the manual to anal count. (*See* R., p.495.)

The district court imposed a unified sentence of twenty years, with ten years fixed. (R., pp.531-35.) Mr. Baeza filed a Notice of Appeal timely from the Judgment of Conviction. (R., pp.541-43.)

ISSUE

Did the district court's order allowing J.C. to testify against Mr. Baeza at trial by the alternative method of closed circuit television violate Mr. Baeza's due process right to a fair trial because the alternative method infringed on his presumption of innocence?

ARGUMENT

The Order Allowing J.C. To Testify Against Mr. Baeza At Trial By The Alternative Method Of Closed Circuit Television Violated Mr. Baeza's Due Process Right To A Fair Trial Because The Alternative Method Infringed On His Presumption Of Innocence

A. Introduction

Mr. Baeza asserts the district court's order allowing J.C. to testify against him at trial, outside his physical presence, by the alternative method of closed circuit television violated his due process right to a fair trial. The alternative method infringed on Mr. Baeza's presumption of innocence.

The district court allowed J.C. to testify by closed circuit television based on *Maryland v. Craig*, 497 U.S. 836 (1990), and I.C. § 9-1806.[1] (*See* R., pp.409-15.) In *Craig*, the United States Supreme Court held in a 5-4 decision that "where necessary to protect a child witness from trauma that would be caused by testifying in the physical presence of the defendant, at least where such trauma would impair the child's ability to communicate, the Confrontation Clause does not prohibit use of a procedure that, despite the absence of face-to-face confrontation, ensures the reliability of the evidence by subjecting it to rigorous adversarial testing and thereby preserves the essence of effective confrontation." *Craig*, 497 U.S. at 857. The Confrontation Clause of the Sixth Amendment to the United States Constitution, made applicable to the States by the Fourteenth Amendment, guarantees to the criminal accused the right "to be confronted with the witnesses against him." *Id.* at 844 (internal citations omitted).[2]

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[1] The district court also discussed Idaho Criminal Rule 43.3, which allows forensic testimony by video teleconference. (R., pp.412-13.)

[2] As the district court noted (R., p.411), the Idaho Constitution does not contain an analogue to the federal Confrontation Clause. *See State v. Sharp*, 101 Idaho 498, 503 (1990).

I.C. § 9-1806, part of the Uniform Child Witness Testimony by Alternative Methods Act (*hereinafter*, Act) contains the factors for determining whether to permit testimony of a child witness by an alternative method, to be considered after a trial court finds "by clear and convincing evidence that the child would suffer serious emotional trauma that would substantially impair the child's ability to communicate with the finder of fact if required to be confronted face-to-face by the defendant." I.C. § 9-1806; *see* I.C. § 9-1805(1)(b).

The United States Supreme Court in *Craig* did not address whether the special procedure violated the defendant's right to a fair trial by infringing on the presumption of innocence, because that argument was not made before the Court. *See* Susan Howell Evans, Note, *Criminal Procedure—Closed Circuit Television in Child Sexual Abuse Cases: Keeping the Balance Between Realism and Idealism*—Maryland v. Craig, 26 Wake Forest L. Rev. 471, 499 (1991). However, Mr. Baeza challenged the alternative method here under both the Confrontation Clause and his due process right to a fair trial. (R., pp.172-73; *see* Tr., July 1, 2014, p.40, L.4 – p.42, L.17.) The order allowing the alternative method violated Mr. Baeza's due process right to a fair trial because the alternative method infringed on his presumption of innocence.

Alternatively, Mr. Baeza's judgment of conviction should be vacated and his case should be remanded because the district court did not adequately consider the relative rights of the parties under I.C. § 9-1806 before ordering the alternative method of allowing J.C. to testify by closed circuit television. The district court did not address Mr. Baeza's assertion the alternative method would violate his due process right to a fair trial. (*See* R., pp.193-98, 409-16.)

B. Standard Of Review

The Idaho Supreme Court has held: "Constitutional issues are purely questions of law over which this Court exercises free review." *State v. Forbes*, 152 Idaho 849, 851 (2012) (internal quotation marks omitted).

C. The Alternative Method Infringed On Mr. Baeza's Presumption Of Innocence

Mr. Baeza asserts his constitutional right to a fair trial was violated because the alternative method infringed on his presumption of innocence. The alternative method was inherently prejudicial. Further, the alternative method was not justifiable as being necessary to further an essential state policy.

Due process protects the right to a fair trial, which includes the presumption of innocence for defendants in criminal cases. "The right to a fair trial is a fundamental liberty secured by the Fourteenth Amendment" to the United States Constitution. *Estelle v. Williams*, 425 U.S. 501, 503 (1976). The Idaho Constitution also protects the right to a fair trial. *See, e.g.*, Idaho Const. art. I, § 13; *State v. Severson*, 147 Idaho 694, 724 (2009).

"The presumption of innocence, although not articulated in the Constitution, is a basic component of a fair trial under our system of criminal justice." *Williams*, 425 U.S. at 503. Over one hundred years ago, the United States Supreme Court held: "The principle that there is a presumption of innocence in favor of the accused is the undoubted law, axiomatic and elementary, and its enforcement lies at the foundation of the administration of our current law." *Coffin v. United States*, 156 U.S. 432, 453 (1895).

The United States Supreme Court later explained the extended historical discussion of the presumption of innocence in *Coffin* could be read to support the

conclusion that a jury instruction emphasizing the requirement of finding guilt only on the basis of the evidence "is an element of Fourteenth Amendment due process, an essential of a civilized system of criminal procedure." *Taylor v. Kentucky*, 436 U.S. 478, 486 n.13 (1978). "[O]ne accused of a crime is entitled to have his guilt or innocence determined solely on the basis of the evidence introduced at trial, and not on grounds of official suspicion, indictment, continued custody, or other circumstances not adduced as proof at trial." *Id.* at 485. Put otherwise, the presumption of innocence cautions the jury "to consider, in the material for their belief, *nothing but the evidence, i.e.*, no surmises based on the present situation of the accused. This caution is indeed particularly needed in criminal cases." *Id.* (quoting 9 J. Wigmore, Evidence 407 (3d ed. 1940)) (internal quotation marks omitted) (emphasis in original). The *Taylor* Court concluded "the Due Process Clause of the Fourteenth Amendment must be held to safeguard 'against dilution of the principle that guilt is to be established by probative evidence and beyond a reasonable doubt.'" *Id.* at 485-86 (quoting *Williams*, 425 U.S. at 503).

"To implement the presumption, courts must be alert to factors that may undermine the fairness of the fact-finding process." *Williams*, 425 U.S. at 503. The United States Supreme Court in *Williams* observed that, while "[t]he actual impact of a particular practice on the judgment of jurors cannot always be fully determined . . . this Court has left no doubt that the probability of deleterious effects on fundamental rights calls for close judicial scrutiny." *Id.* at 504. "Courts must do the best they can to evaluate the likely effects of a particular procedure, based on reason, principle, and common human experience." *Id.*

1. The Alternative Method Was Inherently Prejudicial

Mr. Baeza asserts the alternative method of allowing J.C. to testify by closed circuit television was inherently prejudicial. Practices that impact the presumption of innocence, by presenting an unacceptable risk of impermissible factors coming into play, are inherently prejudicial.

For example, United States Supreme Court in *Williams* held "the State cannot, consistently with the Fourteenth Amendment, compel an accused to stand trial before a jury while dressed in identifiable prison clothes." *Williams*, 425 U.S. at 512. The *Williams* Court indicated this was "because of the possible impairment of the presumption so basic to the adversary system." *See id.* at 504. The Court discussed how "the constant reminder of the accused's condition implicit in such distinctive, identifiable attire may affect a juror's judgment." *Id.* at 504-05. The *Williams* Court continued: "The defendant's clothing is so likely to be a continuing influence throughout the trial that, not unlike placing a jury in the custody of deputy sheriffs who were also witnesses for the prosecution, an unacceptable risk is presented of impermissible factors coming into play." *Id.* (citing *Turner v. Louisiana*, 379 U.S. 466, 473 (1965)). The United States Supreme Court later characterized *Williams* as an example of "close scrutiny of inherently prejudicial practices." *See Holbrook v. Flynn*, 475 U.S. 560, 568 (1986).

Conversely, the *Flynn* Court held "the conspicuous, or at least noticeable, deployment of security personnel in a courtroom during trial" was not inherently prejudicial. *Id.* at 568-69. The Court distinguished the presence of guards from inherently prejudicial practices because of "the wider range of inferences that a juror might reasonably draw from the officer's presence . . . the presence of guards at a

defendant's trial need not be interpreted as a sign that he is particularly dangerous or culpable." *Id.* at 569.

According to the *Flynn* Court, jurors could infer the officers were there to guard against disruptions from outside the courtroom or ensure tense courtroom exchanges did not turn violent. *Id.* The Court also stated jurors might not infer anything at all from the presence of the guards. *Id.* The Court stated the officers, if placed some distance from the defendant, might be perceived more as elements of an impressive drama than reminders of the defendant's special status: "Our society has become inured to the presence of armed guards in most public places; they are doubtless taken for granted so long as their numbers or weaponry do not suggest particular official concern or alarm." *Id.* Having rejected a presumption that the presence of officers was inherently prejudicial, the *Flynn* Court then held the use of the officers in that particular case did not brand the defendant in the jury's eyes "with an unmistakable mark of guilt." *Id.* at 570-71 (internal quotations omitted).

Unlike the presence of guards in *Flynn*, the alternative method of having a complaining child witness testify via closed circuit television is inherently prejudicial. As one commentator put it, "at perhaps the most important moment of the trial—during the testimony of a key government witness—the court makes a nonverbal statement that the accused represents such a threat to the witness that normal trial procedures must be set aside, and the witness must be permitted to testify from behind a barrier or from another room." Ralph H. Kohlmann, *The Presumption of Innocence: Patching the Tattered Cloak after* Maryland v. Craig, 27 St. Mary's L.J. 389, 412-13 (1996). Professor Kohlmann continued: "[T]he message received by some jurors will be that the court is protecting the witness from the accused." *Id.* at 413.

The alternative method here presented "an unacceptable risk . . . of impermissible factors coming into play," *see Williams*, 425 U.S. at 505, because it invited the jury to determine Mr. Baeza's guilt or innocence on grounds outside the evidence presented at trial. Similar to the Maryland statute at issue in *Craig*, *see* 497 U.S. at 856, the Act provides that a special procedure involving the absence of face-to-face confrontation may be ordered only if the trial judge "finds by clear and convincing evidence that the child would suffer serious emotional trauma that would substantially impair the child's ability to communicate with the finder of fact if required to be confronted face-to-face by the defendant." I.C. § 9-1805(1)(b). That standard likely accords with *Craig*, under which, "to have a child testify by closed circuit television, the Confrontation Clause requires a finding that the child testifying in the presence of the defendant would result in the child suffering serious emotional distress such that the child could not reasonably communicate." *See State v. Folk*, 151 Idaho 327, 338 (2011).

Thus, to allow a child complaining witness to testify via closed circuit television, a district court must necessarily find the child would suffer serious emotional trauma from testifying in the defendant's presence. In the words of one commentator, this procedure "reflects what amounts to a legislative presumption of guilt." Brian L. Schwalb, Note, *Child Abuse Trials and the Confrontation of Traumatized Witnesses: Defining "Confrontation" to Protect both Children and Defendants*, 26 Harv. C.R.-C.L. L. Rev. 185, 200 (1991). "The entire procedure is predicated upon the belief that a child witness is sometimes unable to testify in the presence of the person who abused her. Invoking the system thus appears to decide the ultimate question at trial, namely the defendant's criminal culpability." *Id.*

Another commentator illustrated why the closed-circuit television special procedure as used in *Craig*[3] posed "a substantial risk that presumption of innocence will be eroded." Robert H. King, Jr., *The Molested Child Witness and the Constitution: Should the Bill of Rights be Transformed into the Bill of Preferences?*, 53 Ohio St. L.J. 49, 97 (1992). "The defendant had been isolated suddenly from the process, and the jury may well have wondered why. Was it because she posed a danger to the children? If the children were afraid to testify in her presence, did that not confirm the truth of their accusations?" *Id.* The use of closed circuit television testimony "does tend to single out the defendant and is suggestive that she is a danger to the children and therefore guilty." *Id.*

Similarly, Professor Kohlmann concluded that "[s]uch implicit messages from the court may, in some instances, impart an unmistakable mark of guilt to the defendant, increasing the likelihood that the procedure will violate the defendant's right to due process." Kohlmann, *supra*, at 413; *but see Marx v. State*, 987 S.W.2d 577, 581-82 (Tex. Ct. Crim. App. 1999) (holding the admission of closed circuit television testimony did not tend to brand the defendant with an unmistakable mark of guilt). Professor Kohlmann observed: "Affording complaining witnesses special treatment by separating them from the accused implicitly indicates to the jury that the court has deemed the witness a victim, and the accused a threat to the witness." Kohlmann, *supra*, at 413. That is a problem because "[t]he jury, not the trial judge, has the responsibility to determine whether the child is a victim and whether the accused is guilty of some

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[3] While defense counsel in *Craig* was in the room with the child witness and prosecutor, *see Craig*, 497 U.S. at 841, defense counsel here remained in the courtroom during the closed circuit television testimony, (*See* R., p.415.) Also, the closed circuit television special procedure in *Craig* was one-way, *see Craig*, 497 U.S. at 842-43, while the closed circuit television alternative method here was two-way. (*See* R., p.415.)

wrongdoing." *Id.*; *see Duncan v. Louisiana*, 391 U.S. 145 (1968) (holding a defendant charged with a serious crime has the right to have a jury determine his guilt or innocence).

Because a district court may order the closed circuit television alternative method only after finding face-to-face confrontation with the defendant would cause the child complaining witness to suffer serious emotional trauma, the implicit message of guilt from the procedure stems from circumstances not adduced as proof as trial. *See Taylor*, 436 U.S. at 485. In this case, testimony from Ms. Kammer on J.C.'s emotional trauma was not presented to the jury during the trial. (*See generally* Tr., Aug. 12 & 13, 2014.) But the district court allowed J.C. to testify by closed circuit television based on Ms. Kammer's testimony at the alternative methods hearing. (*See* R., p.413.) The alternative method, and its suggestion that Mr. Baeza was a danger to J.C. and therefore guilty, were based on evidence not introduced at trial.

Mr. Baeza does not need to prove that the jury was fully aware of the alternative method's suggestion of guilt. As the United States Supreme Court put it in *Flynn*: "Even though a practice may be inherently prejudicial, jurors will not necessarily be fully conscious of the effect it will have on their attitude toward the accused." *Flynn*, 475 U.S. at 570. According to the *Flynn* Court, "[w]henever a courtroom arrangement is challenged as inherently prejudicial . . . the question must be not whether jurors actually articulated a consciousness of some prejudicial effect, but rather whether an unacceptable risk is presented of impermissible factors coming into play." *Id.* (internal quotation marks omitted).

The alternative method of allowing J.C. to testify by closed circuit television invited the jury to determine Mr. Baeza's guilt or innocence on grounds outside the

evidence presented at trial. That procedure ran counter to the presumption of innocence and its core principle that "one accused of a crime is entitled to have his guilt or innocence determined solely on the basis of the evidence introduced at trial, and not on grounds of official suspicion, indictment, continued custody, or other circumstances not adduced as proof at trial." *See Taylor*, 436 U.S. at 485. The alternative method therefore presented an unacceptable risk of impermissible factors coming into play. *See Williams*, 425 U.S. at 504-05.

The alternative method of allowing J.C. to testify by closed circuit television was inherently prejudicial. Thus, the practice's "probability of deleterious effects on fundamental rights calls for close judicial scrutiny." *See Williams*, 425 U.S. at 504.

2. The Alternative Method Was Not Justifiable As Being Necessary To Advance An Essential State Policy

Mr. Baeza asserts that the alternative method was not justifiable as being necessary to advance an essential state policy. The United States Supreme Court in *Williams* held "compelling an accused to wear jail clothing furthers no essential state policy." *Williams*, 425 U.S. at 505. "That it may be more convenient for jail administrators . . . provides no justification for the practice." *Id.*

But the "close scrutiny of inherently prejudicial practices has not always been fatal." *Flynn*, 475 U.S. at 568. The *Williams* Court contrasted the lack of justification in that case with the justification in *Illinois v. Allen*, where the Court authorized removing a disruptive defendant from the courtroom or, alternatively, binding and gagging the defendant until he agreed to conduct himself properly in the courtroom. *Williams*, 425 U.S. at 505 (citing *Illinois v. Allen*, 397 U.S. 337 (1970). In *Allen*, the Court "expressly recognized that 'the sight of shackles and gags might have a significant effect on the

jury's feelings about the defendant . . . ,' yet the Court upheld the practice when necessary to control a contumacious defendant." *Id.* (quoting *Allen*, 397 U.S. at 344). The *Williams* Court described the state policy in *Allen* as "the substantial need to impose physical restraints upon contumacious defendants," and further observed "[t]he contumacious defendant brings his plight upon himself and presents the court with a limited range of alternatives. Obviously, a defendant cannot be allowed to abort a trial and frustrate the process of justice by his own acts." *Id.* at 505 & n.2.

With respect to the Confrontation Clause, the *Craig* Court identified the important state interest at stake as protecting the physical and psychological well-being of children who are alleged victims of child abuse. *Craig*, 497 U.S. at 852-53. The *Craig* Court held the Confrontation Clause was not violated where the special procedure was necessary to further that important state interest, because the special procedure "adequately ensures the accuracy of the testimony and preserves the adversary nature of the trial." *See id.* at 856-57. According to the Court, "[t]he central concern of the Confrontation Clause is to ensure the reliability of the evidence against a criminal defendant by subjecting it to rigorous testing in the context of an adversary proceeding before the trier of fact." *Id.* at 845.

Conversely, the alternative method of allowing J.C. to testify by closed circuit television undermined, rather than protected, the central concern of the presumption of innocence. A similar State interest in protecting children who are alleged victims of child abuse is at stake here. (*See, e.g.*, R., p.413.) But as discussed above, the presumption of innocence protects the right of defendants to have their guilt or innocence determined solely on the basis of the evidence introduced at trial, and not on circumstances not adduced as proof at trial. *See Taylor*, 426 U.S. at 485. As explored

above, *supra* Section C.1, the practice of closed circuit television testimony necessarily suggests a defendant's guilt based on evidence not adduced as proof at trial. While such special procedures were permissible under the Confrontation Clause because a face-to-face encounter at trial "is not the sine qua non of the confrontation right," *see Craig*, 497 U.S. at 847, the alternative method allowed in this case undermined the very principle the presumption of innocence is designed to protect: "that guilt is to be established by probative evidence and beyond a reasonable doubt." *See Williams*, 425 U.S. at 403.

Further, the alternative method here is distinguishable from the shackling practice approved in *Allen* because it was not required by Mr. Baeza's courtroom behavior. As Professor Kohlmann explained, "[u]nlike shackles . . . alternative testimonial procedures are employed because of an accuser's inability or unwillingness to testify in the defendant's presence, not because the defendant's courtroom or pretrial conduct indicates that he or she represents a present physical threat to the witness at the time of trial." Kohlmann, *supra*, at 412. Thus, Mr. Baeza did not bring "his plight upon himself." *Cf. Williams*, 425 U.S. at 505 n.2 ("The contumacious defendant brings his plight upon himself . . . .").

Because the alternative method of allowing J.C. to testify by closed circuit television undermined rather than protected the central concern of the presumption of innocence, and it was not required by Mr. Baeza's courtroom behavior, it could not be said that it was justifiable as being necessary to advance an essential state policy. Additionally, for purposes of the due process clause right to a fair trial and the presumption of innocence, this alternative method may not even be necessary to further the State's interest in protecting children who are alleged victims of child abuse because

other options were available. As Mr. Schwalb put it, "[p]rocedural variations on the one-way closed-circuit television procedure upheld in *Craig* exist which, if implemented at trial, could prevent unnecessary traumatization of child witnesses and more narrowly infringe upon a defendant's right to confront the child witness." Schwalb, *supra*, at 205. For example, the courtroom or witness chair could be rearranged so the child would not have to look in the defendant's direction. *Id.* "Moreover, psychologists and state prosecutors are often able to counsel a child before trial and thereby enable her to overcome the anticipated trauma of testifying." *Id.*

To summarize, the alternative method here was not justifiable as being necessary to advance an essential state policy. It undermined rather than protected the central concern of the presumption of innocence, and it was not required by Mr. Baeza's courtroom behavior. Additionally, other options were available.

3. The State Will Be Unable To Prove The District Court's Error Was Harmless Beyond A Reasonable Doubt

Mr. Baeza asserts the State will be unable to prove the district court's error in ordering the alternative method of allowing J.C. to testify by closed circuit television was harmless beyond a reasonable doubt. Where alleged error is followed by a contemporaneous objection and the appellant shows that a violation occurred, the State bears the burden of proving the error was harmless beyond a reasonable doubt, based upon the test articulated by the United States Supreme Court in *Chapman v. California*, 386 U.S. 18 (1967). *See State v. Perry*, 150 Idaho 209, 227 (2010). "To hold an error as harmless, an appellate court must declare a belief, beyond a reasonable doubt, that there was no reasonable possibility that such evidence complained of contributed to the

conviction." *State v. Sharp,* 101 Idaho 498, 507 (1980) (citing *Chapman*, 386 U.S. at 24).

It appears harmless error review applies to questions of whether a defendant's right to a fair trial was violated by infringements on his presumption of innocence. In *Williams*, the United States Supreme Court endorsed the application of harmless error review to the issue of compelling a defendant to appear at trial in jail clothing. *See Williams*, 425 U.S. at 506-09.

Here, the State will be unable to prove the district court's error was harmless beyond a reasonable doubt. As shown above, the alternative method in this case presented "an unacceptable risk . . . of impermissible factors coming into play." *See id.* at 505. By separating J.C. from Mr. Baeza, the district court implicitly indicated it had deemed J.C. a victim, and that Mr. Baeza was a threat to J.C. *See, e.g.*, Kohlmann, *supra*, at 413. The State will be unable to show this infringement on Mr. Baeza's presumption of innocence did not contribute to the conviction.

Further, the jury instructions given were inadequate to compensate for the risk the jury would impermissibly assume Mr. Baeza's guilt due to the alternative method. Before J.C. testified at trial, the district court instructed the jury: "Do not give any different weight to [J.C.'s] testimony because of the child-friendly procedures used during her testimony." (Tr., Aug. 12, 2014, p.333, L.19 – p.334, L.4.) The district court gave the same instruction after the parties rested. (Tr., Aug. 14, 2014, p.672, Ls.18-22.) The district court also gave the jury a general instruction that "[u]nder our law and system of justice every defendant is presumed to be innocent." (Tr., Aug. 12, 2014, p.73, Ls.7-8 (to prospective jurors), p.308, Ls.10-11 (during opening jury instructions).)

However, these instructions were inadequate to "compensate for the assumption of guilt that may occur when the court shields the complaining witness from the accused." *See Kolhmann*, 27 St. Mary's L.J. at 416. The instructions did not "explain that the special provisions are due to a general public policy favoring protection of alleged child abuse victims." *See id.* at 417. The instructions also did not remind the jurors that it was their job to determine the facts, or that the alternative method specifically should not affect the presumption of innocence afforded to defendants. *See id.* at 417-18. Thus, the jury instructions given did not dispel the inference of guilt arising from the use of closed circuit television testimony.[4] The State will be unable to show the district court's error was harmless beyond a reasonable doubt.

The alternative method of allowing J.C. to testify by closed circuit television violated Mr. Baeza's due process right to a fair trial by infringing on his presumption of innocence. The State will be unable to show that the error was harmless beyond a reasonable doubt. Thus, Mr. Baeza's judgment of conviction should be reversed. *See Mapp v. State*, 397 S.E.2d 476, 477 (Ga. Ct. App. 1990) (reversing conviction where the defendant was improperly shackled and his "presumption of innocence was infringed").

D. Alternatively, Mr. Baeza's Judgment Should Be Vacated And The Case Remanded, Because The District Court Did Not Adequately Consider The Relative Rights Of The Parties Before Ordering The Alternative Method

Alternatively, Mr. Baeza's judgment should be vacated and the case remanded, because the district court did not adequately consider the relative rights of the parties under I.C. § 9-1806 before ordering the alternative method of allowing J.C. to testify by closed circuit television. The district court did not adequately consider the relative rights

[4] Because Mr. Baeza did not request additional instructions, he does not assert on appeal that the district court's failure to give additional instructions was itself an error.

of the parties because it did not address Mr. Baeza's due process assertion that his rights to a fair trial and the presumption of innocence would be violated.

Again, the Act provides that "[a] child witness' testimony may be taken other than in a face-to-face confrontation between the child and a defendant if the presiding officer finds by clear and convincing evidence that the child would suffer serious emotional trauma that would substantially impair the child's ability to communicate with the finder of fact if required to be confronted face-to-face by the defendant." I.C. § 9-1805(1)(b). If the trial judge determines that standard has been met, the trial judge must "determine whether to allow the presentation of the testimony of a child witness by an alternative method and in doing so shall consider" the following:

> (1) Alternative methods reasonably available;
>
> (2) Available means for protecting the interests of or reducing emotional trauma to the child without resort to an alternative method;
>
> (3) The nature of the case;
>
> (4) The relative rights of the parties;
>
> (5) The importance of the proposed testimony of the child;
>
> (6) The nature and degree of emotional trauma that the child may suffer if an alternative method is not used; and
>
> (7) Any other relevant factor.

I.C. § 9-1806.

In the response to the State's motion for an alternative method, Mr. Baeza challenged the alternative method on the basis of "Confrontation Clause" and on the basis of "Due Process Clause and the Presumption of Innocence." (R., pp.172-73.) The district court, when it issued its initial order allowing the alternative method, stated it had "thoroughly considered all of the factors listed in I.C. § 9-1806," and concluded "the

relative rights of the parties can be served by allowing the victim to testify with her mother and father present." (R., pp.196-97.) However, the district court only discussed the Confrontation Clause in the order, and did not address Mr. Baeza's assertions on due process and the presumption of innocence. (*See* R., pp.193-98.)

Similarly, in support of his motion for reconsideration, Mr. Baeza asserted the alternative method implicated his due process right to a fair trial:

> I guess you can't talk about the issue of [J.C.] testifying in an alternative way and the public trial issue separately because they kind of morph into the same thing where we just got to, I think. But it's not just the right to a public trial. The Idaho Constitution, Article I, Section 13, that is titled Guarantee in a Criminal Action and Due Process of Law. . . . This is a case where if Marcelino is convicted he could go to prison for the rest of his life. There is a potential life sentence to this case. So when you balance the constitutional guarantees he has to a fair trial on the one hand in a case this serious, versus some sleep issues and some anxiety issues on the other hand for this girl, I think it's clear [where] the balance lies.

(Tr., July 1, 2014, p.40, L.17 – p.42, L.15.) But the district court again only discussed the alternative method with respect to the Confrontation Clause in its following order, and did not substantively address Mr. Baeza's due process challenge to the alternative method. (*See* R., pp.409-16.) The district court only mentioned due process in the context of the right to cross-examine witnesses. (*See* R., pp.414-15.) The district court stated it had "considered the factors in I.C. Sec. 9-1806." (R., p.413.)

By not addressing Mr. Baeza's assertions that the alternative method would violate his due process right to a fair trial by infringing on his presumption of innocence, the district court did not adequately consider the relative rights of the parties as required by I.C. § 9-1806. Thus, the district court did not comply with the provisions of the Act before determining whether to allow the presentation of J.C.'s testimony by the alternative method of closed circuit television. *See* I.C. § 9-1806. Mr. Baeza's judgment of conviction should be vacated, and his case should be remanded for the

district court to adequately consider the Section 9-1806 factors before determining whether to allow testimony by alternative method. *See Ag Servs. of Am., Inc. v. Kechter*, 137 Idaho 62, 67 (2002) (vacating and remanding a civil case where the district court did not address an issue).

CONCLUSION

For the above reasons, Mr. Baeza respectfully requests the Court reverse his judgment of conviction. Alternatively, Mr. Baeza respectfully requests the Court vacate his judgment of conviction and remand his case for the district court to adequately consider the I.C. § 9-1806 factors before determining whether to allow testimony by alternative method.

DATED this 26th day of October, 2015.

BEN P. MCGREEVY
Deputy State Appellate Public Defender

CERTIFICATE OF MAILING

I HEREBY CERTIFY that on this 26th day of October, 2015, I served a true and correct copy of the foregoing APPELLANT'S BRIEF, by causing to be placed a copy thereof in the U.S. Mail, addressed to:

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JONATHAN BRODY
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